(5)

No. 04-31

In The
Supreme Court of the United States

HOMAN MCFARLING,

Petitioner,

versus

MONSANTO COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONER'S REPLY BRIEF IN RESPONSE TO BRIEF AMICUS CURIAE OF THE UNITED STATES

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PETITIONER'S REPLY BRIEF IN RESPONSE TO BRIEF AMICUS CURIAE OF THE UNITED STATES

This brief is submitted in response to the brief submitted by the United States on May 27, 2005. That brief contains many arguments with which McFarling disagrees, but this response will be limited to two points: the Solicitor General (1) erroneously claims that McFarling argues that the case is moot, and (2) erroneously bases his legal analysis on the '435 patent and the technology agreement signed by McFarling even though Monsanto has withdrawn its reliance on both of them.

1. In his supplemental brief filed on May 23, 2005, McFarling pointed out that Monsanto had withdrawn its claims based on the '435 patent and on the technology agreement signed by McFarling when he purchased Monsanto's Roundup Ready® seeds. That brief took the position that, because the court of appeals had relied exclusively on those two elements of Monsanto's claims in upholding the grant of summary judgment against McFarling, the basis for the Federal Circuit's holding no longer exists. Therefore, McFarling argued, the proper disposition was to remand the case to the Federal Circuit for further proceedings, in light of Monsanto's withdrawals of the sole basis for the Federal Circuit's ruling. Supp. Br. 1-8.

In its brief to this Court, the United States asserts that McFarling is seeking a ruling that the case is moot (U.S. Br. 8-9). The supplemental brief makes no such argument, nor could it. Monsanto's complaint relies not only on the now withdrawn '435 patent on Roundup Ready® seed, but also on the '605 patent, which covers only technology. The '605 patent, Monsanto continues to

argue, is a proper basis upon which it can outlaw seed-saving. McFarling disagrees that the '605 patent can support Monsanto's outlawing of seed-saving. McFarling has not suggested that the entire case is moot, as the Solicitor General's brief contends. Instead, McFarling asserts that the basis for the Federal Circuit's ruling no longer exists. Arguing that a court decision has no basis is not the same thing as arguing the case is moot. This case in not moot since the controversy still exists. Accordingly, there is no reason for the Court to concern itself with the various objections to mootness raised by the United States (Br. 9-10). The only issue is whether this Court may properly deny certiorari when the legal bases on which the decision below were made no longer exists. The answer to that question, we submit, is "no," and a remand is the appropriate disposition.

2. On page 8 of its brief, the United States expressly recognizes that Monsanto's '435 patent claim and its breach of contract claim have been withdrawn. Nonetheless, in defending the decision of the Federal Circuit, it continues to rely on those withdrawn claims in note 6 on page 12, note 7 on page 13, and the text on page 14 and note 8. The legal analysis of the United States is in error, but for present purposes, the Court need not resolve that dispute because that analysis is based on arguments that Monsanto has abandoned. The issue, now that the '435 patent has been withdrawn, is whether the '605 patent – which does not purport to cover seed – can justify Monsanto's agreement with seed companies to require farmers to purchase new seed each year as a condition to being allowed to purchase Roundup Ready® technology.

While arguing against an issue (mootness) never raised, the United States ignores the crucial reasons the Court should hear this case. These reasons are:

1.) The Federal Circuit has sanctioned a procedure whereby farmers are required to buy overpriced seed from seed companies, as a condition to purchasing the patented technology; (J.A.871) and

2.) The Federal Circuit has permitted Monsanto to outlaw an economically efficient farming method (seed saving) upon which farmers have relied for thousands of years.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision below vacated, and the case remanded to the Federal Circuit for its consideration in light of the withdrawal of the '435 patent, which was the basis for the Federal Circuit's allowing Monsanto to outlaw farmers' traditional right to save their own seed for replanting.

Respectfully submitted,

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